Supreme Court, U.S.
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No. 03-574

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

HONAS RICHARDS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

As the petition demonstrates, the decision below satisfies every criterion for review by this Court. The Sixth Circuit rejected as "no longer ... good law" the test for causation under FELA announced by this Court in *Davis* v. *Wolfe*, 263 U.S. 239 (1923). By arrogating to itself the power to overrule decisions of this Court, it "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And in so doing, it widened an already-mature conflict—indeed, a decades-old conflict—among numerous state and federal courts about the causation standard applicable under FELA. These conflicts, too, warrant review by this Court. *Id.* 10(a). The critical importance of this issue, which applies to every FELA claim, only confirms the need for plenary review.

Respondent attempts to save the decision below by implausibly recasting it as merely an application of this Court's longstanding proximate causation standard announced in *Davis*. This contention is untenable given that the Sixth Circuit (1) expressly abrogated the "incidental condition" test of proximate causation established in *Davis* and followed in *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), in favor of its own causation test; (2) held that *Reetz* "no longer is good law" after *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), Pet. App. 14a, not that it merely misapplied this Court's *prior* decision in *Davis*; and (3) has previously held that proximate causation has no place in FELA, *Tyree* v. *New York Central Railroad*, 382 F.2d 524, 529 (6th Cir. 1967). In all events, regardless of how the decision is characterized, the circuit courts and state supreme courts are irreconcilably split on the standard of causation under FELA, and this Court's intervention is imperative.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BINDING PRECEDENT OF THIS COURT, WHICH THE COURT OF APPEALS DEEMED TO BE OVERRULED.

The petition demonstrates that the decision below stands squarely in conflict with *Davis*. The Sixth Circuit deemed the rule established in *Davis* to have been abrogated by this Court's subsequent decision in *Rogers*. See Pet. 9-19. The Sixth Circuit's ruling—a violation of the judicial chain of command and, furthermore, erroneous—should be reviewed. Respondent attempts to explain away this judicial misstep on the theory that "the Sixth Circuit did not effectively hold that *Rogers* overruled *Davis v. Wolfe*, but rather it recognized that *Rogers* applied the concept of proximate cause used in *Davis*." Brief in Opposition ("BIO") 8 (capitalization omitted). The opinion below belies that assertion. Because Respondent misstates the manner in which the opinion below treated these prior decisions of this Court, it is important briefly to rehearse those precedents.

In *Davis*, the Court synthesized prior cases regarding the causation standard under FELA. In so doing, it (1) reaffirmed that FELA plaintiffs must demonstrate that railroad conduct was a "proximate cause" of their damages; and (2) distinguished the notion of "proximate cause" from the creation of an "incidental condition or situation" that caused the plaintiff's injury:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury*; and, on the other hand, *he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident*, resulting in injury to him while in the discharge of

> his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243 (emphases added).

In *Reetz*, the Sixth Circuit implemented this rule—as, of course, it was bound to do under *Davis*. 46 F.2d at 51-52. The Sixth Circuit repeated in full the above-quoted language from *Davis*, *id.* at 51; repeatedly used the term "proximate cause," *id.* at 50, 51, 52; and analyzed the distinction drawn in *Davis* between proximate causation and the creation of incidental conditions in which the plaintiff is injured, *id.* at 52. Since the early part of the twentieth century, therefore, the *Davis* distinction has governed proximate cause under FELA across the country, and certainly in the Sixth Circuit.

Respondent's assertion that the Sixth Circuit merely corrected *Reetz*'s misapplication of the *Davis* proximate causation standard has no foundation in the opinion below. It is beyond dispute that the court below improperly abrogated the *Davis* test. The Sixth Circuit began by recognizing that:

> [p]rior to *Rogers*, several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances where the defect merely was incidental in creating the condition in which the plaintiff was injured,

Pet. App. 8a-9a. To be sure, the court neglected to acknowledge expressly that this Court (in *Davis*) had been one of those "several courts." Nonetheless, the Sixth Circuit then stated that "[a]s the district court relied on this incidental situation versus instrumentality distinction to decide the present matter, this court must determine whether *Reetz* still is applicable to decide causation in FSAA cases following *Rogers*." *Id.* at 9a. It observed that since *Rogers*, the Sixth Circuit had been inconsistent in its adherence to the "*Reetz* distinction," but that "[i]n none of the cases declining to apply

Reetz' distinction ... has the court overruled that decision." *Id.* at 9a-10a.

The Sixth Circuit then proceeded to criticize as "troublesome" the distinction between proximate causes and "incidental conditions" drawn in *Davis*. Pet. App. 13a ("determining in a given case whether an alleged defect is the proximate cause or merely a condition of the plaintiff's injury is often a troublesome matter"). It then dispensed with this distinction as "no longer ... good law" "in light of *Rogers*," *id.* at 14a, which it viewed as having "announced a relaxed test for establishing causation in FELA cases," *id.* at 7a. According to the Sixth Circuit, a court may no longer (as *Davis* had held, 263 U.S. at 243) rule in favor of a defendant if a SAA violation did no more than create an "incidental condition or situation" in which the plaintiff was injured. Now, the claim survives for trial if "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury," *i.e.*, if such "injury 'was within the risk created by' the defective appliance." Pet. App. 14a. Thus, on the theory that there existed a conflict between the logic of *Davis* and *Rogers*, the court below determined that the latter overruled the former—a conclusion that was emphatically *not* within the Sixth Circuit's province, see *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). Pet. App. 8a-9a, 14a.

Contrary to Respondent's claims, it is of no moment that the Sixth Circuit euphemistically referred to the test it overruled as the "*Reetz* distinction" rather than the "*Davis* distinction." A court of appeals may not insulate its decision from review by purporting to overrule circuit precedent, rather than the decision of this Court that the prior circuit precedent strictly followed. It is also irrelevant that the Sixth Circuit found the outcome of its ruling consistent with certain *pre-Rogers* cases that had rejected *Reetz* under a proximate cause standard. BIO 6-7; Pet. App. 10a-13a (discussing *N.Y., New*

Haven & Hartford R.R. v. *Leary*, 204 F.2d 461 (1st Cir. 1953), and *Warning* v. *Thompson*, 249 S.W.2d 335 (Mo. 1952)). The bottom line is that the Sixth Circuit *rejected* the substantive standard of causation established by *Davis*, and that creates a stark conflict with the precedents of this Court that warrants review.[1]

The Sixth Circuit's decision to treat the reasoning of *Davis* as anachronistic—which it had no authority to do in any event—was, furthermore, erroneous. As the petition demonstrates, *Rogers* did not overrule *Davis*. Pet. 15-16. The two cases dealt with entirely different aspects of causation. Whereas *Davis* established the minimum causal proximacy between railroad action and employee injury that the employee must show, *Rogers* dealt with the circumstances under which a claim must be submitted to a jury when there is evidence of multiple possible causes of the injury. See *id.* And to the extent *Rogers* did mention FELA's standard of proximacy, it worked no new law; it simply applied past precedents that themselves relied upon *Davis*. See *id.* at 16.[2]

In short, this case squarely and cleanly presents an important legal issue—namely, whether *Rogers* overruled *Davis*—that the court below resolved erroneously, and in contravention of Supreme Court precedent.[3] As such, it deserves this Court's review.

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[1] Indeed, Respondent fails to identify anything in the opinion below that could conceivably be read as holding that *Rogers* was an application of *Davis*. And with good reason: At no point did the court below suggest that *Rogers* applied the *Davis* standard of proximate cause. And at no point did that court even purport to apply *Davis*.

[2] Respondent is quite mistaken to contend that our argument assumes *Rogers* and *Davis* to be "incompatible." BIO 8. To the contrary, and as explained at some length in the petition, Pet. 9, 13-16, those cases are fully compatible. It is the courts (including the court below) that have taken differing approaches to whether *Davis* and *Rogers* are in tension and, if so, how to reconcile them. *See infra* at 7-10.

[3] For this reason, it is of no moment that the issue arises in an interlocutory posture. It is well-established that "the interlocutory status of the

II. THE DECISION BELOW WIDENS VARIOUS LOWER COURT DECISIONAL CONFLICTS OVER THE MEANING OF *ROGERS* AND THE CAUSATION RULE APPLICABLE UNDER FELA.

As the petition demonstrates, the lower courts have made a hash of the FELA causation standard in general, and of the relationship between *Rogers* and *Davis* in particular. The

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case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." R. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002). Here, the case would be over if the Sixth Circuit had properly affirmed the district court's grant of summary judgment under the *Davis* standard. Moreover, nothing is to be gained in awaiting trial since the plaintiff will no doubt seek to have the *Rogers* "slightest cause" standard included in the jury instructions on causation, even though *Rogers* was explicit that this standard is only "the test of a jury case" where there is evidence of multiple causation, 352 U.S. at 506. Delaying review for trial on an improper legal standard will simply waste federal judicial resources.

Respondent's suggestion that this Court "rarely" reviews nonfinal decisions of lower federal courts, unless they are "'extraordinary,'" BIO 4, 5, is thoroughly belied by this Court's actual practice. Last Term, this Court reviewed more than two dozen such cases. These included numerous cases arising in a posture similar to the case at bar. *E.g.*, *City of Los Angeles* v. *David*, 123 S. Ct. 1895 (2003) (reviewing reversal of summary judgment); *Clackamas Gastro. Assocs., P.C.* v. *Wells*, 123 S. Ct. 1673 (2003) (same); *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (same); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (same); *Boeing Co.* v. *United States*, 537 U.S. 437 (2003) (same); *Borden Ranch P'ship* v. *Army Corps of Eng'rs*, 537 U.S. 99 (2002) (per curiam) (same); *see also Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003) (reviewing partial affirmance and partial reversal of summary judgment); *Dow Chem. Co.* v. *Stephenson*, 123 S. Ct. 2161 (2003) (per curiam) (reviewing reversal of dismissal of case); *Inyo County* v. *Paiute-Shoshone Indians*, 123 S. Ct. 1887 (2003) (same); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (same); *United States* v. *White Mt. Apache Tribe*, 537 U.S. 465 (2003) (same); *Meyer* v. *Holley*, 537 U.S. 280 (2003) (same); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (same); *Am. Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003) (reviewing reversal of preliminary injunction); *Pharm. Res. & Mfrs. of Am.* v. *Walsh*, 123 S. Ct. 1855 (2003) (same).

wildly divergent legal rules announced in the lower courts have led to conflicts on multiple issues, between both state and federal courts. Respondent altogether fails to reconcile the conflicts identified in the petition; his attempt to do so is a jumble of misunderstandings, mischaracterizations and, most revealing, admissions that conflicts in fact exist.

First, the lower courts are divided over whether *Rogers* even spoke to the substantive standard of causation that a plaintiff must prove under FELA. See Pet. 19-20. The court below concluded that *Rogers* did address that issue, for it concluded that *Rogers* overturned the causation standard set forth in *Reetz* and *Davis*. See *supra* at 3-4. So have other courts, as explained in the petition. *E.g.*, *Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (interpreting *Rogers* as a "departure from traditional common-law tests of proximate causation"); Pet. 23-24 (citing cases). This is Respondent's view of *Rogers* as well. BIO 11; see also *id.* at 8-9.

In direct conflict with this conclusion, other courts have held that *Rogers* did not concern the question of when a railroad's action is a legal cause of a plaintiff's injury, but instead evaluated the very different question of the circumstances under which a case should go to the jury when there are multiple causes of a plaintiff's injury. See Pet. 19-20; see also *id.* at 15-16 (explaining this theory of *Rogers*). In *Marazzato* v. *Burlington Northern Railroad*, for instance, the Montana Supreme Court rejected precisely the theory of *Rogers* that the Sixth Circuit adopted here:

> Mr. Marazzato cites *Rogers* for the proposition that FELA is liberally construed to require only a slight amount of foreseeability to get a FELA case to a jury. The *Rogers* Court went on to say "[i]t does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." *Rogers*, 352 U.S. at 506. It is obvious from this statement that the *Rogers* case was addressing the issues

> of multiple causes and contributory negligence after it had been established that the employer was negligent.

817 P.2d 672, 674 (Mont. 1991) (alteration in original); see *Strobel* v. *Chi., Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-20 (Minn. 1959).

Respondent does not even attempt to explain away this conflict. (On the contrary, he appears to misunderstand it as a conflict over the *extent to which Rogers* modified *Davis*, not the antecedent question *whether Rogers* modified *Davis* at all. BIO 11.) On this issue, the conflict is stark: Some courts view *Rogers* as speaking to the proximate cause standard under FELA, whereas others view it as a case about the test for submitting a case to the jury when multiple causes exist.

Second, separate and apart from the conflict over whether *Rogers* modified FELA's test of legal cause, there is a wide-ranging and mature conflict over the proper standard of causation under FELA. The petition demonstrates this conflict, Pet. 20-25, which Respondent has failed to refute.

For instance, with regard to *Reed* v. *Pennsylvania Railroad*, 171 N.E.2d 718 (Ohio 1961), Respondent broadly asserts that "[b]oth courts"—the Sixth Circuit in the decision below, and the Ohio Supreme Court in *Reed*—"applied the same standard of law," and were simply different on their facts. BIO 12. This bald assertion altogether ignores the actual opinion of the Ohio Supreme Court, which applied an entirely different legal test than the court below. *Reed* quoted and relied upon *Davis* for the proposition that proximate causes are actionable under FELA but incidental conditions are not—precisely the distinction that the Sixth Circuit rejected in this case. Compare 171 N.E.2d at 722 (quoting *Davis*), with Pet. App. 9a-10a, 14a (rejecting the "incidental situation versus instrumentality distinction"). Indeed, this distinction was the very holding of the *Reed* court; it was precisely because the court concluded that that case involved an incidental condition

(rather than a direct effect) that it found no liability for the railroad. 171 N.E.2d at 722.

The simple fact is, no matter how this Court views the opinion below, there exists an undeniable and broad-based conflict over the causation standard that applies under FELA. This conflict cannot be explained away on the wishful theory that the differences among the courts are merely semantic. Cf. BIO 11 ("some courts describe the proper standard in slightly different terms"); *id.* at 13 (the cases "sometimes us[e] imprecise language"). On the contrary, there is a substantive division between courts that continue to apply proximate cause, and those that believe proximate cause to have been abolished by *Rogers*.

It is beyond dispute that, in contrast to *Reed* and other similar cases, see Pet. 20-22, some courts have concluded that FELA requires no showing of proximate cause. In fact, buried in a footnote, Respondent concedes as much. BIO 14 n.2 In *Summers* v. *Missouri Pacific Railroad Systems*, the Tenth Circuit wrote that *Rogers* "definitively abandoned" proximate cause. 132 F.3d 599, 606 (10th Cir. 1997). In the face of this language, it is simply implausible to assert that the Tenth Circuit "recogni[zes] that proximate cause is applicable in FELA/FSAA cases." *Id.* at 13. Indeed, were it not clear from *Summers* that the Tenth Circuit has abandoned proximate cause, such a rule is plain from *Wilson* v. *Union Pacific Railroad*, 56 F.3d 1226, 1230 (10th Cir. 1995), in which the Tenth Circuit ratcheted down the FELA causation standard to the bare-bones level of "but for" causation.

Numerous other courts have likewise interpreted *Rogers* as having jettisoned proximate cause under FELA. The Ninth Circuit has concluded that after *Rogers*, "'proximate cause' is not required under the FELA." *Oglesby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993). The Second Circuit has held that "to impose liability" under FELA, "the negligence need not be the proximate cause of the injury." *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958). (Given this clear

language, Respondent's contention that *Nicholson* actually applied proximate cause, BIO 14 n.2, is implausible.) The Fifth Circuit has referred to FELA's causation standard as "featherweight," *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988), and has contrasted it with proximate cause, *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985).[4] And according to the Florida Supreme Court, "the concept of proximate cause no longer has any place in an action under the Federal Safety Appliance Act." *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972); but cf. BIO 15 n.2 (stating that *McCalley* "is not as broad as it first seems"). See also Pet. 23-24 (citing cases).

These multiple, deep-seated conflicts are the result of 50 years of confusion about the meaning of *Rogers*.[5] Only this Court can clarify this issue, for only this Court can resolve the relationship between *Rogers* and *Davis*. The lack of uniformity in this area of national importance fully warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[4] Respondent's attempt to explain *Johnson* is so misleading as to deserve particular comment. Richards asserts that *Johnson* employed proximate cause under the Jones Act (which mirrors FELA). It certainly did not. In applying the Jones Act, *Johnson* used the "featherweight" causation standard. 845 F.2d at 1352. Its only mention of proximate cause—in the language quoted by Respondent, BIO 13 n.2—came in a discussion of a claim for unseaworthiness which, the court took pains to "stress," employs "a more demanding standard of causation," 845 F.2d at 1354.

[5] Respondent asserts that this Court has "consistently reaffirmed" *Rogers*, BIO 9-10, but none of those cases resolved the question presented by this petition or remotely suggested that *Rogers* abrogated the *Davis* "incidental condition" test of causation. *See Norfolk & W. Ry.* v. *Ayers*, 123 S. Ct. 1210, 1226 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 562 n.8 (1987). *See* Pet. 24 n.9.

Respectfully submitted,

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